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IN THE

Supreme Court of the United States

October Term, 1966
No. 67

HELEN MAXINE LEVI TRAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

Stricty Construed, as It Must Be, Section 1185 Does Not Provide Criminal Sanctions for Area Travel Restrictions.

The Government urges that the requirement in Section 1185 of a "valid" passport for departure vests in the Department the substantive power to *prohibit* travel to designated geographical areas. This on the theory that the passport is "valid" only for such travel as the Secretary authorizes. It is petitioner's thesis that, whatever else "valid" encompasses, it does not include the power to forbid travel to designated areas on pain of criminal penalties. The explicit statements of the legislation's sponsors in 1918, 1941 and 1952 exclude such a purpose as the Government here imputes to the Congress. The language employed in the statutes was

sufficient to attain the limited objectives voiced by those sponsors, while it is silent on the question of prohibiting travel geographically or by destination. But most important the administrative expertise of the Department of State in effectuating the statute (not the *post litem motam* ingenuity of the Solicitor General in this litigation) has for many years consistently disclaimed such power of prohibition. If the historical approach to the "content" of a statute expounded in *Zemel* (381 U.S. at 18) is to be the basis for resolving the question of statutory construction here, the weight of the evidence greatly preponderates in petitioner's favor.

Under all of the Acts the Department of State consistently treated area restrictions upon passports as civil matters only, directed to withdrawing the request for safe passage, not as restrictions making travel criminal under any of the departure Acts. The Department's words and deeds to such effect over the many years concerned, supported on two occasions by Congressional reenactments of the departure legislation without expression of contrary or broader purpose, speak far more forcefully as to the fair meaning of the present statute than do the arguments for expanded purpose advanced now.

In support of its contention that "valid" under Section 1185 includes geographical limitations the Government (a) points to claimed administrative practices in 1914 and in 1940, preceding the 1918 and 1941 Acts respectively, under which the Department required passports to "set forth the specific countries to be visited and the purposes of the travel" (G. B. 22*), and urges

*Signifying Government Brief ("Brief for the United States"), page 22.

that Congress in passing those Acts must have had these practices in mind in requiring a "valid" passport to depart the country; and (b) points as well to 8 U.S.C. Sec. 1101(30), enacted with Section 1185 in 1952 as part of the Immigration and Nationality Act of 1952, defining a passport as a "document . . . which is valid for . . . entry . . . into a foreign country," and urges this definition *in se* imports recognition of area restrictions.

Neither proposition is well taken.

The Government points first to claimed wartime practices during World War I and World War II, preceding the 1918 and 1941 Acts, requiring that passports specify the countries to be visited and the "object of visit," and urges that while no mention of such practices or of any intention to limit departures to "valid" destinations appears in the Congressional debates or committee reports attending the passage of either of such Acts, it is "hardly probable" that Congress was "unaware" thereof. (G. B. 21.) The Government says:

> "Our argument with respect to the history of these acts rests . . . not on what legislative reports or debates expressly say. It is founded rather on the premises from which Congress must have proceeded when it passed the statutes of 1918, 1941 and 1952. On each occasion, the Department of State's passport policy was geographically restrictive: a passport was 'valid' only for certain destinations. In enacting Section 215(b) and its predecessors Congress must, we believe, have incorporated this standard of validity into the statute." (G. B. 25.)

But the Government concedes the 1918, 1941 and 1952 Acts "d[o] not in so many words, prohibit violations of area restrictions" but "spea[k] . . . [only] . . . in the language of 'border control statutes regulating departure from and entry into the United States.'" (G. B. 11.) The Government further concedes that "the debates on the floor of [Congress] do [not] show any awareness . . . by the sponsors of the legislation or those who questioned them of the problem [of area restrictions]." (G. B. 20.)

These are serious concessions. The debates on the 1918 and 1941 Acts were extensive, occupying as to the 1918 Act 24 pages in the Congressional Record, and as to the 1941 Act, 14 pages. (P. B. 24-25, fns. 7 and 9.*) Not only do these debates fail to "show any awareness" of any "problem" or need to criminally enforce area restrictions but they demonstrate affirmatively that Congress' "sole purpose" (1941 debates; P. B. 24) was to provide *border control* prohibitions upon entries or departures by "persons . . . engaged in espionage and subversive activities . . . [or] in activities inimical to the best interests of the United States"; there was *expressly disavowed* any purpose "to restrict or . . . in any way to impede the legitimate travel of citizens . . ." (*Id.*)

Moreover the Department overlooks completely the forceful circumstance that it itself consistently construed the 1918 and 1941 Acts, by contemporaneous constructions, as *not* lending criminal sanctions to area restrictions. As related in defendant's Opening Brief the Department issued five separate area restrictions during the operative periods of the 1918 and 1941

*Signifying Petitioner's Brief ("Brief for Petitioner"), pages 24-25, footnotes 7 and 9.

Acts and in not one did it say—or even suggest—that violations of such restrictions could be criminally punishable under either of such Acts. (P. B. 25-28.)

Thus though the Department urges now that Congress in enacting the 1918 Act "must . . . have incorporated" area restrictions "into the statute" because of prior "geographically restrictive" passport practices, the Department took no such view of the Act in 1919 when, virtually contemporaneously with the passage of that statute, it issued its area restriction of that year as to travel to Germany. There, so far from suggesting that the 1918 Act could criminally punish mere departure for Germany, the Department, while announcing it was no longer "issuing or authorizing issuance . . . of passports for Germany," affirmatively declared that it "interposes no objection" to travel there without a passport by any person with "important . . . business," though "such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions." (3 Hackworth, Digest of International Law, 530; P. B. 26-27.) This is clearly not language of criminal prohibition, such as would apply if the 1918 Act were conceived to make area restrictions penal, but language merely of civil withdrawal of the safe-passage passport functions. In this restriction and the four other area restrictions announced during the periods of the 1918 and 1941 Acts, the Department, contrary to what it now sees so clearly as the meaning Congress "must have" intended, plainly conceived area restrictions despite those Acts in purely civil, not criminal, terms.

Moreover at the critical time at bar of Congress' consideration in June 1952 of Section 1185, Congress had before it the particularly explicit May 1, 1952 Department statement declaring that the Department's area restriction issued that day as to travel to East European countries, China and the Soviet Union *"in no way forbids"* travel to such countries, but amounts merely to a "taking [of] additional steps to warn American citizens of the risks of travel in . . . [such] countries." (26 Dept. St. Bull. 736; P. B. 27.) This despite the fact that the 1941 Act was then in full force and effect. The Department could not have more clearly advised Congress that the requirement of a "valid" passport for departures under the criminal prohibitions of the 1941 Act was not construed to lend criminal sanctions to area restrictions. This declaration was issued, as the Department observes in its brief, "in May 1952—one month before the enactment of [Section 1185]" (G. B. 25); it is, therefore, as the Department concedes, plainly "relevant in determining Congress' understanding of the term 'valid passport.'" (*Id.*)

The Government's brief makes no comment on the foregoing forceful evidence of administrative construction of the predecessor 1941 Act occurring immediately before that Act's reenactment as Section 1185, but turns instead to a passing statutory definition of a "passport" in the 1952 Immigration and Nationality Act, of which Section 1185 was part. That definition (8 U.S.C. Sec. 1101(30)) recites that a passport means "any travel document issued by competent authority" which is "valid for . . . entry . . . into a foreign country." But that definition imports no recognition of area restrictions as conditions upon "valid" passports.

The reference "valid for . . . entry . . . into a foreign country" is merely a *generic* description of the "foreign travel" characteristic of passports. It says no more than that passports are designed for *foreign* travel, not for domestic travel or usages. Had Congress truly meant to make area restrictions conditions of departure under Section 1185 (in the face of the consistent administrative construction to the contrary under the predecessor statutes), Congress could readily have defined a passport explicitly as a document "valid for entry into the country or countries which is/are the bearer's destination." Congress did not do so and the reference used, "valid for . . . entry . . . into a foreign country," imports merely "valid" for "foreign" travel *generically*.

Moreover, if the definition be read as bearing any measure of implication that Section 1185 was intended to provide criminal sanctions for area travel restrictions, there must be offset against such consideration in any event not only the prior contrary administrative construction under the 1918 and 1941 predecessor Acts as heretofore described, but continuing and even more impressive contrary administrative construction under Section 1185 itself. Prior to the restriction as to travel to Cuba involved at bar, the Department since enactment of Section 1185 had issued three area restrictions (P. B. 28-29); all of these sounded in civil, safe-passage terms only, and none so much as mentions Section 1185. Moreover, the Department has conceded that "approximately 600" persons have violated area restrictions since the enactment of Section 1185, yet the cases at bar, and the *Worthy* prosecution for entry, represent the first attempts by the Department ever to prosecute per-

sons under Section 1185 for claimed violations of area restrictions. (P. B. 32.)

Additionally, questioned on the very issue by the Senate Foreign Relations Committee in 1957, the Department in a considered statement officially advised the Committee that travel to an area restricted country *in se* violates *no criminal law.* (P. B. 30-31.) The Committee asked the Department, "What does it mean when a passport is stamped 'not valid to go to country X'?" Does this mean, the Committee asked, merely that the United States "withdraws its protection" from such travel, *or* does it mean the United States "prohibits the person from going to country X?" After two months of careful study the Department replied that such a stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law.*" (P. B. 31.) The Department said there were criminal laws "which might well be violated *in the course* of such travel", mentioning "e.g. The Trading With The Enemy Act," and, additionally, such travel might lead to the denial of a future passport and might raise questions as to whether "false statements" had been made in obtaining the passport in question. But the mere travel to the area-restricted country *in se* would be *no crime.* No mention or citation was made of Section 1185 as even relevant to the issues posed, despite the thorough canvass of the law.

There would seem to be no doubt that had the Department in thus communicating its considered views to the Senate Committee truly conceived that Section

1185 applied to make criminal a mere leaving of the United States to go to "country X", it would have said so. What it said, and did not say, bears eloquent witness to its then belief that Section 1185 did not apply to violations of area travel restrictions.*

In its brief the Department attempts to urge (G. B. 28, fn. 8) its 1957 statement to the Senate Committee "is not inconsistent" with its present position that Section 1185 makes area restrictions penal because (a) Section 1185 "applies only in times of war or emergency", hence the Department "was right" in advising that travel to a restricted country is not "necessarily" criminal since it is not criminal "if there is no national emergency in effect", and (b) a traveler to a restricted country would not violate Section 1185 "if he forms the intention of going [to such country] after he has left the United States." But as to argument (a) the required "national emergency" has been proclaimed and in effect at all times since January 17, 1953 (P. B. 5, fn. 1) and was in full effect when the Department responded to the Committee in 1957, and as to argument (b) the likelihood of a person's arriving at the described intent only after departure from the United States makes the Department's remark no more than a qualification on a general principle. Clearly any reasonable approach of candor to the Senate Committee would

*This administrative construction by the Department that Section 1185 is inapplicable and irrelevant to travel in violation of area restrictions was repeated, moreover, in the passport form issued by the Department prior to January 1961. We are informed, and we believe the Government will not question, that prior to January 1961 the passport form issued by the Department listed the restricted areas and followed these only by an admonition warning of possible prosecution under 18 U.S.C. Sec. 1544 for improper "use" of the passport contrary to any restrictions or conditions, but without any reference at all to Section 1185.

have required the Department, if it believed Section 1185 made criminal a mere leaving for a restricted country, to say so and to add as but possible qualifying exceptions the matters it now raises in "explanation" for not stating any applicability of Section 1185 at all.

Finally the Department would deprecate the significance of the call by the President himself in 1958 for new legislation to criminally prohibit area restricted travel and the Department's drafting and submission to Congress of bills to such effect and Congress' nonaction thereon. (P. B. 33-34.) The Department would discount this climaxing administrative construction indicating inapplicability of Section 1185 by citing four *civil* cases to the effect that "public policy" requires that administrative agencies be free "to ask legislation which will terminate or avoid adverse contentions and litigations" and that "requests by government agencies and the resulting nonaction of Congress" should not be construed "as affirmative evidence of no authority." But the four cited and quoted cases, *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597; *Wong Yang Sung v. McGrath*, 339 U.S. 33; *United States v. du-Pont and Co.*, 353 U.S. 586 and *United States v. Philadelphia National Bank*, 374 U.S. 321, all dealt with *civil* proceedings wherein the issue was the proper interpretation of *civil statutes* only. Thus the *Dean Foods Co.* case dealt with administrative standing to invoke appellate judicial relief under the All Writs Act, 28 U.S.C., Section 1651(a); the *Wong Yang Sung* case dealt with the applicability of the Administrative Procedure Act to deportation proceedings; and the *du-Pont* and *Philadelphia National Bank* cases dealt with civil injunction proceedings to set aside stock acquisi-

tions claimedly invalid (but not criminal) under Section 7 of the Clayton Act, 15 U.S.C., Section 18.

Involved at bar is a *criminal* cause. At issue is the proper construction of Section 1185 as a *criminal statute*. The President's and the Department's requests of Congress at bar for new legislation to criminally prohibit area-restricted travel express executive construction of Section 1185 as not already providing such criminal restraint, or at least as not doing so clearly. What is important is not Congress' inaction *in se* but the continuing administrative construction of Section 1185 as not lending criminal sanctions to area restrictions. This continuing construction, climaxing many years of administrative words and acts to like import as heretofore seen, demonstrates, it is submitted, that Section 1185 is at least ambiguous as to prohibiting area restricted travel, and it is at least a reasonable reading of the statute to exclude such prohibiting effect. For the purposes of a criminal statute this should be decisive. If two readings of a criminal statute are plausible and reasonable, one favoring innocence and the other guilt, the rule of strict construction would appear to require that the "narrow" construction favoring innocence be adopted. (*Yates v. United States,* 354 U.S. 298, 310; *Harrison v. Vose,* 50 U.S. (9 How.) 372, 378; *Bell v. United States,* 349 U.S. 81, 83-84; *Heflin v. United States,* 358 U.S. 415, 419; *Ladner v. United States,* 358 U.S. 169, 177-178; *Kraus & Bros., Inc. v. United States,* 327 U.S. 614, 626; *United States v. Wiltburger,* 18 U.S. (5 Wheat.) 76, 93.) And particularly should this be the case where the interpretation favoring innocence is supported by so impressive a history of administrative practice and construction as that demonstrated at bar.

II.

To Uphold Section 1185 as Sanctioning Criminal Punishment in the Premises at Bar Would Violate Due Process for Vagueness, Contradiction and Misleading Terms in the Communication of a Criminal Command.

Defendant has urged that in light of the many explicit and implicit implications by the Government prior to the instant prosecution that its area travel restrictions were noncriminal in nature (climaxed by the circumstance that the Regulation at bar was expressly promulgated only under the *civil* Act of July 3, 1926 and the further circumstance that the Press Release and Public Notice accompanying the Regulation sound only in civil, safe-passage terms), to sustain prosecution at bar would offend due process for vagueness, contradiction and misleading terms in the communication of a criminal command.

The Government has replied only that it was "stipulated" that defendant "knew of the applicable regulation and of the provisions of Section 215(b)." (G. B. 32.) The true stipulation was only that defendant "knew the provisions" of the statute and of "Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." [R. 51.] This does not at all stipulate to knowledge of the *meaning* or *effect* of the statute or Regulation as claimed now by the Government. It means defendant knew the terms and contents of the statute and of the Excluding Cuba Regulation. But that knowledge is only the beginning of the problem as to the presence or absence of fair notice. The regulation was expressly promulgated not under Section 1185 but only under the Act of July 3, 1926, a civil statute providing no

criminal punishment for violations of regulations issued under it. Additionally, Public Notice 179 accompanying the Regulation repeated this civil promulgative authority, and both it and Press Release No. 24, also accompanying the Regulation, sounded in civil, safe-passage terms only. The Press Release in particular explained the withdrawal of passport rights for travel to Cuba as being due to the Government's "inability . . . to extend normal protective services to Americans visiting Cuba." (P. B., App. E.)

Moreover, most significant is what the Regulation, Press Release and Public Notice did *not* say. No word of warning is expressed in any of them that criminal sanctions under Section 1185 may be brought to bear to enforce the area restriction as to travel to Cuba. In light of the many years of administrative construction that area restrictions were not criminal in nature, and in light particularly of the explicit 1952 statement of the Department that such restrictions "in no way forbid" affected travel and the 1957 statement by the Department that travel *in se* to area restricted countries constitutes *no crime,* it is indefensible for the Government in 1961 in promulgating the Cuban travel restriction not to specify and clearly state the consequence of criminal punishment under Section 1185 for any travel in breach of the new restriction if it intended subsequently to urge such punishability. To fail to give such warning in the light of such premises of confusion and contradiction was to violate fair dealing.

The Department further suggests that there can be no legitimate complaint of want of fair warning because citizens "plainly knew" that violations of area restrictions "might result in the revocation of their pass-

ports." (G. B. 32.) But knowledge of the possibility of civil disadvantage or penalty is no substitute for reasonable fair warning of potential *criminal punishment*. To merely state the contrary contention is to refute it.

Finally the Department declares that all passports "since January 1961" have borne a stamp listing "countries upon which area restrictions have been imposed" and an explicit warning to the bearer that, "A person who travels to or in the listed countries may be liable for prosecution under Section 1185, Title 8, U.S. Code, and Section 1544, Title 18, U.S. Code." (G. B. 31.) What the Government does not add is that prior to January 1961, as heretofore noted, passports had for years borne the same listing of area restricted countries followed *only* by an admonition relating to possible prosecution under 18 U.S.C., Section 1544 for improper "use" of the passport contrary to any restrictions or conditions, but *without any mention of Section 1185 as being even relevant*. Thus until January 1961 the official passport form adopted by the Department failed to warn of any criminal enforceability of area restrictions under Section 1185, and, indeed, by omission strongly indicated the precise contrary. The Government has not shown defendant had a post-1961 passport form and not a pre-1961 form. Hence it cannot rely on the 1961 form to cure want of fair notice. The form for passports is not a matter chargeable by constructive notice, and particularly not in a criminal cause.

III.

Questions Relating to Delegation of Legislative Power and to Personal Liberty and Freedom of Speech, Thought and Association.

The Government urges *Zemel v. Rusk* is dispositive at bar as to defendant's claims of improper delegation of legislative powers and of denials of personal liberty and of freedom of speech, thought and association, contending the attempt at bar to impose criminal sanctions upon violations of area restrictions raises no "basic" new issues. (G. B. 33-36.) Defendant here renews her Constitutional claims and notes that in the particulars and for the reasons already stated in her Opening Brief the differences between criminal penalties and merely civil consequences can be, and at bar should be held to be, dispositive in favor of private rights and liberties within the Constitutional areas concerned, and defendant incorporates those prior statements here without repeating them.

One aspect of the Government's discussion as to freedom of speech calls for special comment. Defendant urged in her Opening Brief (P. B. 62-64) that the Excluding Cuba Regulation grants the Secretary unconstitutional *censorial, discretionary power* as to freedom of travel to Cuba because empowering him to permit or deny such travel as he finds the same to be "in the best interests of the United States." (Press Release No. 24; P. B. 62 and App. E.) The Government argues *Zemel v. Rusk* has determined "that travel . . . is not a right protected by the First Amendment; con-

sequently, the Secretary is not licensing speech when he determines who may and may not travel to Cuba." (G. B. 34.)

But this assertion cuts too broadly. This Court has said liberty of travel is a freedom "closely related to rights of free speech and association" (*Aptheker v. Secretary of State,* 378 U.S. 500, 517), and has recognized, with Chafee, that "in many different ways . . . [it] contributes to sounder [democratic] decisions." (*Kent v. Dulles,* 357 U.S. 116, 127.) If the right to travel is not assimilable fully within freedom of speech it is, like public picketing, at least a right closely related to liberty of speech and embracing that liberty within it at least in some important part. This Court has recognized that picketing, because it "is inseparably something more" than pure free speech, is subject to some regulation not permissible as to free speech alone. (*Hughes v. Superior Court,* 339 U.S. 460, 464.) But no one would suggest that picketing could be licensed by government and subjected to censorial, discretionary suppressive control such as is condemned in *Cox v. Louisiana,* 379 U.S. 536, 557 and the related free speech censorial-control basis cited in defendant's Opening Brief at pages 62-63. It is the same with the right to travel. It partakes enough of pure freedom of speech, thought and association to be Constitutionally immune from censorial licensing power such as that created at bar by the Excluding Cuba Regulation.

As to the question of delegation of legislative powers the Government urges the rule requiring that delega-

tions relating to criminal statutes be judged with particular strictness is inapplicable at bar because "Congress did not delegate . . . the power to *create* a crime" but itself "defined the crime—departing the United States without a valid passport—and left to the Department . . . [only] the details concerning a passport's validity." (G. B. 35.) But whether area restrictions are to be constituted *criminal prohibitions* on travel is not a "detail concerning a passport's validity" but a vital question of *policy,* and one, moreover, not resolved by Congress in favor of criminal restraint. What has been said heretofore and in defendant's Opening Brief concerning the legislative history and administrative practices under the three departure statutes combines to make it plain that the policy question of whether to place criminal restraint upon travel to area-restricted countries was not considered or determined by Congress. As the Government concedes, the legislative record does not "show any awareness" by Congress "of this problem." (G. B. 20.) Accordingly when the Department attempted by the Excluding Cuba Regulation at bar both to require a passport under Section 1185 for travel to Cuba and to simultaneously prohibit the issuance of any passport for such travel, it did more than round out a "detail"—it created the substance and content of a new "crime". And this it did without guidance or control by adequate, or indeed any, legislative standards. It is just such administrative conduct which the Constitution condemns.

Conclusion.

Defendant reiterates without repeating all of the other considerations and points urged in her Opening Brief, and upon all of the grounds stated herein and in said Opening Brief respectfully urges that the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1966.

Helen Maxine Levi Travis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 10, 1967.]

Mr. Justice Fortas delivered the opinion of the Court.

This is a companion case to No. 176, *United States v. Laub, ante.* Petitioner was tried on a stipulation of facts, under an indictment which alleged that on two occasions she "did unlawfully, knowingly and willfully depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a valid passport is required" in violation of § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (b). The parties stipulated that "At no time pertinent or material herein did defendant, Helen Maxine Levi Travis, bear a valid United States passport specifically endorsed for travel to the Republic of Cuba . . . ." This stipulation is all that the record in this case reveals as to petitioner's possession of a valid passport. Petitioner was convicted, and the Court of Appeals affirmed. We granted certiorari in light of the important questions raised by petitioner, and the apparent conflict with the decision of the District Court for the Southern District of New York in the *Laub* case, *ante*, which we affirm today.

As our decision in *Laub* determines, if petitioner in fact had a valid passport, and the gravamen of the Government's accusation under § 215 (b) were that her passport was not valid for travel to Cuba, this conviction

could not stand. We have today held that area restrictions upon the use of an otherwise valid passport are not criminally enforceable under § 215 (b). Because the Government did not allege, and introduced no proof, that petitioner did not bear a valid passport on each of the occasions on which she departed for Cuba, via Mexico, our decision in *Laub, ante*, requires that her conviction be reversed.

Accordingly, the judgment of the Court of Appeals is

Reversed.